

No. 9822.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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J. LEROY MOSER and CECIL CARROLL MOSER,  
husband and wife,

*Appellants,*

*vs.*

MORTGAGE GUARANTEE COMPANY, a corporation,

*Appellee.*

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BRIEF FOR APPELLANTS.

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BRIEF FOR APPELLANTS.

---

PRELIMINARY STATEMENT.

This appeal arises in proceedings under Section 75(s) of the Bankruptcy Act, as amended, and is taken by the debtors from an Order on Petition for Review of an order of the Conciliation Commissioner for Kern County, California, fixing the value of the debtors' property and the time for payment of such value into court, the debtors having requested the reappraisal of their property under the provisions of Section 75 (s) (3). The appellee, Mortgage Guarantee Company, is a secured creditor, holding trust deed upon the property.

## JURISDICTIONAL STATEMENT.

The appellants are the petitioning debtors in proceedings instituted in the District Court of the United States for the Southern District of California, Northern Division, under the provisions of Section 75 of the Bankruptcy Act, as amended (11 U. S. C. A. Sec. 203), and in which the debtors amended their petition and on the 5th day of May, 1937, were adjudicated bankrupt under the provisions of Section 75 (s) of the Bankruptcy Act (11 U. S. C. A. Sec. 203 (s)). Exclusive jurisdiction in such proceedings is vested in the federal courts (11 U. S. C. A. Sec. 203 (n)). Subsection (n) of said section provides that the jurisdiction of the appellate courts is the same as if a voluntary adjudication had been filed and a decree of adjudication entered on the day when the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of the court.

Section 75 (n) *Bankruptcy Act* (11 U. S. C. A. Sec. 203).

Petition for review of an order of the Conciliation Commissioner was duly filed by the debtors [Tr. pp. 16-23] within the time allowed [Tr. pp. 14, 15] and was heard, the order of the District Judge thereon, from which this appeal is taken, having been made on the 14th day of March, 1941. [Tr. pp. 27-31.]

Notice of appeal was duly filed herein on the 10th day of April, 1941 [Tr. p. 32] and order approving the bond for costs on appeal was made by the District Judge on said 10th day of April, 1941. [Tr. p. 35.]



## STATUTE INVOLVED.

The provisions of Section 75 (s) of the Bankruptcy Act, as amended (11 U. S. C. A., Sec. 203 (s) pertinent herein are as follows:

“Sec. 75 (s). Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this Act. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this Act: Provided, That in proceedings under this section, either party may file objec-

tions, exceptions, and take appeals within four months from the date that the referee approves the appraisal.

“Sec. 75(s)(1). After the value of the debtor’s property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that the possession, under the supervision and control of the court, of any part of parcel or all of the remainder of the debtor’s property shall remain in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.

“Sec. 75 (s) (2). When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semiannually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the

amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property. Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear. The court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, such sale to be had at private or public sale, and may, in addition to the rental require payments on the principal due and owing by the debtor to the secured and unsecured creditors, as their interests may appear, in accordance with the provisions of this Act, and may require such payments to be made quarterly, semiannually, or annually, not inconsistent with the protection of the rights of the creditors and the debtors' ability to pay, with a view to his financial rehabilitation.

“Sec. 75 (s) (3). At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: Provided, That upon request of any secured or unsecured creditor, or upon request of the debtor, the

court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: Provided, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his discharge, as provided for by this Act. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act.

“Sec. 75 (s) (4). The conciliation commissioner, appointed under subsection (a) of section 75 of this Act, as amended, shall continue to act, and act as referee, when the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt under the provisions of subsection (s) of section 75 of this Act, and continue so to act until the case has been finally disposed of. \* \* \*”

## STATEMENT OF THE CASE.

On April 9, 1937, appellants filed their petition in proceedings for composition or extension under Section 75 of the Bankruptcy Act, thereafter amended their petition under the provisions of Sections 75 (s), and on May 5, 1937, were adjudicated bankrupt under the provisions of said Section 75 (s). Proceedings were had pursuant thereto, including the appraisal of their property [Tr. p. 2], and the making of a rental order [Tr. pp. 3-6]. Said rental order, dated December 1, 1937, provided that the debtors should remain in possession of their property for a period of three years. [Tr. pp. 3-6.] Under date of June 10, 1938, an amended rental order was made [Tr. pp. 6-9], differing only from the original, in that it provided for the payment of semi-annual payment of rent by the debtors on the 5th day of December and June, instead of the 5th day of December and the 20th day of April of each year.

On December 2, 1940, pursuant to the provisions of said Section 75 (s) (3), appellants made application to the Conciliation Commissioner for Kern County for re-appraisal of their property, consisting of an 80-acre ranch and vineyard near Delano, California. [Tr. pp. 9-10.] The debtors were instructed to and did deposit the sum of \$25.00 with the Conciliation Commissioner for appraiser's fees and thereafter deposited an additional sum of \$25.00 for such fees. Boyce R. Fitzgerald was appointed as such appraiser, and on January 10, 1941, filed his report

and re-appraisal of said property with the Conciliation Commissioner, appraising the property at \$9,000. [Tr. p. 13.] Said Conciliation Commissioner set the matter down for hearing for the purpose of determining whether the appraisal should be accepted or rejected and hearing was had on January 10, 1941. At the hearing there were present the debtor, J. LeRoy Moser, in person, without counsel, and Fleming & Robbins, by C. S. Tinsman, Esquire, representing secured creditor Mortgage Guarantee Company, the appellee herein. A transcript of the hearing appears in the record. [Tr. pp. 49-78.] The matter was submitted and on January 16, 1941, the Conciliation Commissioner made an Order Fixing Value of Debtors Real Property [Tr. pp. 21-22], wherein he concludes that the value of the said ranch and vineyard is the sum of \$12,000 and debtors were given until March 15, 1941, to pay into court said sum.

Extension of time for the filing of a petition for review was ordered [Tr. pp. 14-15] and petition for review was filed by the appellants herein within the time allowed. [Tr. pp. 16-23.]

The certificate of the Conciliation Commissioner on review was filed with the clerk of the district court on March 10, 1941. [Tr. pp. 23-24.] It appears therefrom that the Conciliation Commissioner, after hearing the parties and their appraisers and after making a personal visit to the ranch and taking additional evidence,

came to the conclusion that the property was worth \$12,000. [Tr. pp. 23-24.]

Petition for review came on for hearing on March 10, 1941, before the Honorable Paul J. McCormick, District Judge, at which time debtors appeared in person and by their attorney, Lloyd S. Nix, and said secured creditors Mortgage Guarantee Company, was represented by its attorneys, Fleming & Robbins, by C. S. Tinsman of counsel, and the matter was heard and submitted.

On March 14, 1941, the Court made its order that the procedure followed by the Conciliation Commissioner fixing the value of the debtors' property by causing a reappraisal thereof to be had and thereafter fixing the value of such property at a hearing for such purpose in accordance with the evidence submitted, was in accordance with the powers expressly conferred upon said Conciliation Commissioner by the provisions of Section 75 (s) (3) of the Bankruptcy Act and the order of said Conciliation Commissioner of January 16, 1941, fixing the value of the debtors' ranch property at the sum of \$12,000 was approved and confirmed, with the exception that said debtors have to and including June 15, 1941, to pay into court the value so fixed in lieu of March 15, 1941, as fixed in said order of the Conciliation Commissioner. [Tr. pp. 27-31.] Exception to the order was taken by the debtors and was noted.

## SPECIFICATION OF ERRORS RELIED ON.

Statement of points upon which appellants intend to rely upon appeal are set forth at pages 36 to 42 and 80 and 81 of the transcript. Each of said points is relied upon by appellants. Said assignments of error are as follows:

### I.

That the Court erred in making said order, in that the procedure set forth in the statute and in such cases made and provided was not followed in each and all of the following respects: That Section 75 (s) (3) provides, in the alternative, for a reappraisal of the property or a hearing by the Court to fix the value of the property, and further that no appeal was taken from said reappraisal, and further that the hearing before the Conciliation Commissioner was called for the purpose of determining whether the reappraisal would be accepted or rejected and not for the purpose of fixing value of said property, and further that the Conciliation Commissioner in fixing the value of said property based his findings and order on facts or evidence other than and in addition to those adduced at the hearing before him, and further that the Conciliation Commissioner considered evidence other than that of official appraisers appointed by the court, and further that no order or ruling was made by the Conciliation Commissioner upon the reappraisal of \$9,000.00 made by the appraiser appointed pursuant to the provisions of said Section 75 (s) (3) and no reference to said reappraisal is made in the order of said Conciliation Commissioner.

### II.

That the Court erred in making said order, in that the value of \$12,000.00 fixed by said Conciliation Commissioner by his said order fixing value was not in accordance



with the evidence adduced at the hearing had before said Conciliation Commissioner.

### III.

That the Court erred in making said order, in that said order is against law, and particularly that the Conciliation Commissioner took evidence out of Court, without notice to the debtors and without right of cross-examination, and considered the same in reaching his decision.

### IV.

That the Court erred in making said order, in that the evidence was insufficient to justify a finding that said property is of the value of \$12,000.00, and particularly in that there was no evidence adduced at said hearing before the Conciliation Commissioner from which such a finding could be made.

## SUMMARY OF ARGUMENT.

Point I. The Court erred in making its order of March 14, 1941, in that the procedure set forth in Section 75 (s) of the Bankruptcy Act was not followed.

(a) Debtor adjudicated bankrupt under Section 75 (s) entitled to have proceeding entertained and property dealt with in accordance with that subsection.

(b) Section 75 (s) (3) provides that upon request of the debtor, the Court shall cause reappraisal of debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted.

(c) Request of Debtor for Reappraisal [Tr. pp. 9-10].

(d) Appraiser appointed and Report made [Tr. p. 13].

(e) Hearing called for purpose of accepting or rejecting reappraisal [Tr. pp. 49-50].

(f) Statute provides for reappraisal or hearing to fix value.

(g) No order or ruling made by Conciliation Commissioner on the reappraisal.

(h) Conciliation Commissioner considered evidence not submitted at hearing.

Point II. The Court erred in making its order of March 14, 1941, in that the value of \$12,000 fixed by the Conciliation Commissioner by his order fixing value was not in accordance with the evidence adduced at the hearing had before the Conciliation Commissioner.

(a) Testimony of Boyce R. Fitzgerald.

(1) Appraised Moser property at \$9,000.

(2) Estimate of market value based on actual sales; familiar with property for twenty years.

(3) Rippy property, sale price \$8,000.

(4) Linebarger property, sale price \$8,000.

(5) California Lands Co. sale \$9,000.

(6) Sale at \$75.00 per acre.

(7) Two sales at \$125.00 per acre.

(8) Inability to obtain higher prices.

(9) \$9,000 present market value of Moser property.

(b) Testimony of F. A. Nighbert.

(1) Estimated value of Moser property.

(2) Did not know condition of well.

(3) Considered subdivision possibilities.

(4) Present fair and reasonable market value to be determined.

(5) Mosesian property sale, \$16,000.

(c) Testimony of H. L. Richmond.

(1) Mosesian property.

(2) Other Mosesian property \$10,000.

(3) Income, Moser property, decrease.

(4) Well, Moser property.

Point III. The Court erred in making its order of March 14, 1941, in that said order is against law, and particularly that the Conciliation Commissioner took evidence out of Court, without notice to the debtors and without right of cross-examination, and considered the same in reaching his decision.

(a) Commissioner considered evidence not submitted at hearing.

(b) Right to have issues proved by witnesses, subject to cross-examination.

(c) Right to cross-examine is absolute, not a mere privilege.

Point IV. The Court erred in making its order of March 14, 1941, in that the evidence was insufficient to justify a finding that said property is of the value of \$12,000.

(a) Evidence does not justify finding that Moser property is of value of \$12,000.

ARGUMENT.

POINT I.

The Court Erred in Making Its Order of March 14, 1941, in That the Procedure Set Forth in Section 75(s) of the Bankruptcy Act Was Not Followed.

- (a) A Debtor Adjudicated Bankrupt Under Section 75(s) Is Entitled to Have His Proceeding Entertained and Property Dealt With in Accordance With That Subsection.

*John Hancock Mutual Life Ins. Co. v. Bartels*, 308 U. S. 180, 60 S. Ct. 221, 84 L. ed. 176;

*Borchard v. California Bank*, 310 U. S. 311, 60 S. Ct. 957, 84 L. ed. 1222.

- (b) Section 75(s)(3) Provides That Upon Request of the Debtor, the Court Shall Cause Reappraisal of Debtor's Property, or in Its Discretion Set a Date for Hearing, and After Such Hearing, Fix the Value of the Property, in Accordance With the Evidence Submitted.

Section 75 (s) (3), *Bankruptcy Act*, 11 U. S. C. A., Sec. 203 (s);

*Wright v. Union Central Life Ins. Co.*, ..... U. S. ...., 61 S. Ct. 196, 85 L. ed. 166.

This subsection provides for reappraisal or in the discretion of the Court a hearing for the purpose of fixing the value of debtor's property.

- (c) Request of Debtor for Reappraisal.

In the instant case the debtor, in a letter dated December 2, 1940, directed to the Conciliation Commissioner, requested reappraisal of his property [Tr. pp. 9, 10].

**(d) Appraiser Appointed and Report Made.**

Boyce R. Fitzgerald was appointed an appraiser to re-appraise debtors' property and debtors paid appraiser's fees in the sum of \$50.00. No objections or exceptions to the report were filed. On January 10, 1941, Report of Appraiser on reappraisal, appraising the property at \$9,000.00 was filed [Tr. p. 13].

**(e) Hearing Called for Purpose of Accepting or Rejecting Reappraisal.**

The following is quoted from the transcript:

“By the Commissioner: We have the appraisement of the Official Appraiser appointed to appraise the real property belonging to this Estate. The return of the Appraiser fixes the estimate and appraisal of the real property in the sum of \$9,000. Now, I am prepared to hear evidence from any source to either accept or reject this appraisement” [Tr. pp. 49-50].

At said hearing the debtor J. LeRoy Moser was present without counsel, and there testified Boyce R. Fitzgerald, the appraiser appointed by the Court [Tr. pp. 50-60], F. A. Nighbert, a witness called by the secured creditor, appellee herein [Tr. pp. 60-70], and H. L. Richmond, an employee of the appellee in charge of its Fresno office [Tr. pp. 70-77].

**(f) Statute Provides for Reappraisal or Hearing to Fix Value.**

It is the contention of debtors, that the procedure prescribed by Section 75 (s) is either a reappraisal by appraisers appointed by the Court for that purpose, to whose report objections might be made and exceptions taken and

from which an appeal might be taken as provided in Section 75 (s) or that in its discretion the Court might set a date for hearing and after such hearing fix the value of the property in accordance with the evidence submitted, but that it was not intended that both methods should be utilized in a single proceeding. The statute expressly provides for either a reappraisal or in the discretion of the Court a hearing to fix value.

**(g) No Order or Ruling Was Made by the Conciliation Commissioner on the Reappraisal.**

In the order of the Conciliation Commissioner fixing value of debtors' property, no reference is made to the reappraisal [Tr. pp. 21-22].

**(h) Conciliation Commissioner Considered Evidence Not Submitted at Hearing.**

From the Commissioner's Certificate on Review [Tr. pp. 23, 24], it appears that he based his findings and order on facts or evidence not submitted at the hearing, in that he made a personal visit to the ranch and talked to other property owners in the vicinity.

"After hearing all parties in interest and their appraisers and after making a personal visit to the ranch and looking the property over and I talked to other property owners in the vicinity I came to the conclusion that the property was worth \$12,000.00 and that is my finding and I accordingly fixed the value at the said amount" [Tr. pp. 23, 24].

Appellants respectfully submit that the method employed by the Conciliation Commissioner in fixing the value of debtors' property was irregular and does not conform to the provisions of Section 75 (s) (3) of the Bankruptcy Act.

## POINT II.

The Court Erred in Making Its Order of March 14, 1941, in That the Value of \$12,000.00 Fixed by the Conciliation Commissioner by His Order Fixing Value Was Not in Accordance With the Evidence Adduced at the Hearing Had Before the Conciliation Commissioner.

### (a) Testimony of Boyce R. Fitzgerald.

#### (1) Appraised Moser Property at \$9,000.

Mr. Boyce R. Fitzgerald, the appraiser appointed by the Conciliation Commissioner, appraised debtor's property at \$9,000.00 [Tr. p. 13; pp. 50, 51].

#### (2) Estimate of Market Value Based on Actual Sales.

Upon cross-examination by the attorney for the appellee herein, he testified that he based his estimate of market value on the actual sales that had taken place in the immediate vicinity in the last three years. Also that he was a real estate broker and had been familiar with the Moser property for twenty years [Tr. p. 50].

#### (3) Rippy Property, Sale Price \$8,000.

The Rippy property, across the road from the Moser property, and consisting of eighty acres as does the Moser property was sold two years ago for \$8,000.00 cash [Tr. p. 51]. It appears that this was not a forced sale [Tr. p. 53]. The testimony also shows that forty acres of the Rippy place is in vineyard which is in considerably better shape than that on the Moser property [Tr. p. 52], there being about forty-five acres of vines on the Moser property [Tr. p. 53]. The Rippy place also has a cotton record, and the balance of the acreage had been in cotton [Tr. p. 51]. Also the well on the Rippy place will furnish

more water [Tr. p. 52]. Mr. Moser stated that there were two sets of buildings on the Rippy place, more valuable than his [Tr. p. 52], while Mr. Fitzgerald testified that the buildings on the Moser property might be worth a little more [Tr. p. 52]. The Moser property has a four-room house, barn, and drying shed, also pumping plant [Tr. p. 52]. The vines on the Moser place are Thompson seedless, fifteen or sixteen years old [Tr. p. 58].

**(4) Linebarger Property, Sale Price \$8,000.**

Mr. Fitzgerald also testified as to a sale of eighty acres, about a quarter mile east of the Moser property, which had been sold in 1935 by the Occidental Life Insurance Co. to Linebarger for \$8,000.00, half of the minerals being reserved [Tr. p. 54]. At the time of the sale that property was in vines, although they have since been taken out, and there is a four-room house, livable only [Tr. p. 54].

**(5) California Lands Co. Sale \$9,000.**

He also testified that within the last month or six weeks 80 acres, two or two and one-half miles southeast of the Moser property, which was in an oil leasing district, had been sold by the California Lands Co. for \$9,000. That twenty acres was in vines, the balance leased or used for growing lettuce and melons [Tr. p. 56]. That the place had a well and pumping plant, but no houses or barns, just a shack [Tr. p. 56].

**(6) Sale at \$75.00 Per Acre.**

Also that there was a sale in 1937 at \$75.00 per acre, but that he had only learned of that late the day before and had not had an opportunity to inspect the property [Tr. p. 56].



**(7) Two Sales at \$125.00 Per Acre.**

Also that within the last year or eighteen months two 80-acre parcels had been sold at \$125.00 per acre. That they both were all in vineyard and had wells sufficient to irrigate the entire 80 acres [Tr. pp. 57-58].

**(8) Inability to Obtain Higher Prices.**

Mr. Fitzgerald also testified that he is a real estate broker, that he had had some other listings, but that sales had failed to materialize for any more than the prices on the actual sales to which he testified [Tr. p. 59].

**(9) \$9,000 Present Market Value of Moser Property.**

That the sum of \$9,000.00 at which he appraised the property represented its market value at the present time [Tr. p. 59].

**(b) Testimony of F. A. Nighbert.**

The secured creditor called as a witness F. A. Nighbert, a State Inheritance Tax Appraiser.

**(1) Estimated Value of Moser Property.**

He testified that the Moser property is at the present time worth \$25,000.00 [Tr. p. 62]. He estimated the value of the raw land at \$200.00 per acre or a total of \$16,000.00 and of the vines at \$100.00 per acre or \$5,000.00, the house (20 years old) at \$1,500.00, the barn at \$1,000.00 and the other out buildings at \$1,000.00, the reservoir at \$250.00 and pipe at \$1,500.00. That he depreciated his total of \$26,750.00 to give the \$25,000.00 valuation [Tr. pp. 63-64].

(2) Did Not Know Condition of Well.

He further testified that he did not know the true condition of the well, but that taking off \$3,000.00 for the cost of a new pump to put the water on a 100% pumping basis, it would still be in excess of \$20,000 [Tr. pp. 63, 64].

However, it appears elsewhere in the transcript that the pumping equipment was sufficient to irrigate the entire property, but that there was only about half enough water available and that the soil was too light for raising vegetables or barley [Tr. pp. 74, 75]. It appears that the depth of the Moser well is 205 feet but that there is not another well within a mile and a half or two miles that is under 450 feet [Tr. p. 66].

(3) Considered Subdivision Possibilities.

Mr. Nighbert in making his appraisal also considered the subdivision possibilities [Tr. p. 66] and testified that the growth of the town of Delano in its direction made the property worth a lot more than the land adjoining it or close to it [Tr. pp. 66, 67].

On the other hand, Mr. Fitzgerald testified that a subdivision or the selling of acreage had been attempted, but that it had been a disappointment because the cost of buying water from the city made it prohibitive to put in any kind of orchard or to do any gardening [Tr. p. 55] and that the possibility of subdivision into town lots did not give the Moser property considerable value [Tr. p. 55].

(4) Present Fair and Reasonable Market Value to be Determined.

Under the provisions of Section 75 (s) it is not the speculative or prospective value of the property, but the present fair and reasonable market value of the property which is to be determined.

*Bankruptcy Act*, Sec. 75 (s), 11 U. S. C. A., Sec. 203 (s).

(5) Mosesian Property Sale, \$16,000.

The only sale as to which Mr. Nighbert testified was the Mosesian property, which he testified was purchased within the last three years for \$16,000 to \$18,000 and he had heard was for sale for about the same price. [Tr. p. 62.] On cross-examination it appeared that the price was \$16,000.00, \$3,000.00 being paid down [Tr. p. 68]: that the price of grapes a ton had dropped from \$16.00 in 1937 to \$8.00 in 1939 [Tr. p. 69]; that the buildings on the Mosesian property were no better than on the Moser property, but that it had a better well. [Tr. p. 69.]

(c) Testimony of H. L. Richmond.

Mr. H. L. Richmond, manager of the Fresno office of the appellee, was called by said secured creditor as a witness, and testified that he was familiar with both the Moser and Mosesian property.

(1) Mosesian Property.

He testified that the Mosesian property was sold for \$16,000.00 by the Mortgage Guarantee Co., the appellee herein, in 1937 [Tr. pp. 70, 71], and at that time

had about forty acres of old vines on it, that since then he had put in twenty or twenty-five acres of new vines, but was going to take them out because he could do better with vegetables [Tr. p. 71].

(2) Other Mosesian Property \$10,000.

Upon cross-examination it appeared that Mr. Mosesian had bought another eighty acre piece directly north of the Moser property in 1936 for \$10,000.00 [Tr. p. 72] and that at that time raisins were bringing \$65.00 a ton [Tr. p. 72].

(3) Income, Moser Property, Decrease.

With reference to the Moser property, it appears that in 1937 there was a gross income of \$4,500.00 or \$5,000.00, that the income was \$2,000.00 less in 1938 and about \$2,400.00 less in 1939, although the production was about the same [Tr. p. 73].

(4) Well, Moser Property.

It appears the well is 205 feet deep, produces approximately 300 gallons per minute, but to irrigate on the particular soil it should have at least double that amount, that the well has often been sucked dry, and that the pump would pump about four times as much water as is available [Tr. p. 74].

It is respectfully submitted that the value of \$12,000.00 fixed by the Conciliation Commissioner by his order fixing value was not in accordance with the evidence adduced at the hearing.

### POINT III.

The Court Erred in Making Its Order of March 14, 1941, in That Said Order Is Against Law, and Particularly That the Conciliation Commissioner Took Evidence Out of Court, Without Notice to the Debtors and Without Right of Cross-Examination, and Considered the Same in Reaching His Decision.

(a) Commissioner Considered Evidence Not Submitted At Hearing.

The Commissioner in his Certificate on Review [Tr. pp. 23, 24] states that he visited the ranch and talked to other property owners in the vicinity and “after hearing all parties in interest and their appraisers and after making a personal visit to the ranch and looking the property over and I talked to other property owners in the vicinity I came to the conclusion that the property was worth \$12,000.00 and that is my finding and I accordingly fixed the value at the said amount.”

(b) Right to Have Issues Proved by Witnesses, Subject to Cross-examination.

From time immemorial litigants have had the right to have issues proved by witnesses, subject to cross-examination.

“After issue joined, every witness must testify in open court or under commission. From time immemorial litigants have had the right to have issues in actions proved by witnesses, subject to cross-examination.”

64 *Corpus Juris*. p. 122, Sec. 138.

“In so far as is consistent with the provisions of Section 75 and of this general order, the conciliation commissioner shall have all the powers and duties of a referee in bankruptcy and the general orders in bankruptcy shall apply to proceedings under said section.”

General Order 50 (11), Bankruptcy.

“In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be.”

General Order 37, Bankruptcy.

“The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and shall be governed by the Rules of Civil Procedure for the District Courts of the United States, in so far as they are not inconsistent with the Act or with these general orders.”

General Order 22, Bankruptcy.

In the Rules of Civil Procedure for the District Courts of the United States, it is provided that the testimony of witnesses shall be taken orally in open court.

Rule 43, Rules of Civil Procedure.

**(c) Right to Cross-examine Is Absolute, Not a Mere Privilege.**

The right to cross-examine is absolute not a mere privilege.

*The Ottawa*, 3 Wall. 268, 271, 18 L. ed. 165;  
*Alford v. U. S.*, 282 U. S. 687, 51 S. Ct. 218, 75  
L. ed. 624.

#### POINT IV.

The Court Erred in Making Its Order of March 14, 1941, in That the Evidence Was Insufficient to Justify a Finding That Said Property Is of the Value of \$12,000.

(a) Evidence Does Not Justify Finding That Moser Property Is of Value of \$12,000.

There was no evidence introduced at the hearing before the Commissioner to justify a finding that the Moser property is of the value of \$12,000.00.

Mr. Fitzgerald was cross-examined upon his appraisal of \$9,000.00 and testified as to sales in the immediate vicinity. These various sales have been enumerated in the discussion under Point II in this brief and support his appraisal of \$9,000.00.

The only other witness testifying as to the value of the Moser property was Mr. Nighbert, who stated that the property was worth about \$25,000.00 and even with an allowance for putting in a new pump, in excess of \$20,000.00 and that the raw land was worth \$16,000.00 [Tr. pp. 62, 63]. In reaching this valuation he stated that he considered the possibility of subdivision of the property [Tr. p. 66]. Under the provisions of Section 75 (s) of the Bankruptcy Act, it is the present fair and reasonable market value of the property which is to be determined. It also appears from the transcript that he was not familiar with the water conditions upon the Moser property [Tr. pp. 63, 64].

The evidence upon which a finding as to value must be based is that introduced at the hearing before the Conciliation Commissioner, not that which he may have obtained as a result of personal investigation or interrogation elsewhere.

From the evidence introduced at the hearing, it appears that the Moser property was no more valuable than other eighty-acre parcels in the vicinity which had been sold for \$8,000.00 or \$9,000.00. It is respectfully submitted that the evidence introduced at the hearing was insufficient to justify a finding that the property is worth the sum of \$12,000.00.

### Conclusion.

Appellants respectfully submit the order from which this appeal is taken should be reversed.

Respectfully submitted,

LLOYD S. NIX,

*Attorney for Appellants.*